

TRANSCRIPT OF BAIL HEARING  
BEFORE THE HONORABLE OTIS D. WRIGHT, II  
UNITED STATES DISTRICT JUDGE

13 Appearances: See next page.  
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25 Proceedings recorded by electronic sound recording;  
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1       Los Angeles, California; Monday, April 28, 2025 1:37 p.m.

2                             --oo--

3                             (Call to Order)

4                             THE CLERK: Calling Item 4, CR 24-91 and CR 24-  
5 702, United States of America versus Alexander Smirnov.

6                             Counsel, may I have your appearances, please,  
7 beginning with the Plaintiff.

8                             MR. KEENAN: Your Honor, good morning -- or good  
9 afternoon, excuse me. It's been a long day. Good  
10 afternoon. Rob Keenan for the United States.

11                          THE COURT: Good afternoon, sir.

12                          MR. SCHONFELD: Good afternoon, your Honor.

13 Richard Schonfeld appearing on behalf of Alexander Smirnov.

14                          MR. CHESNOFF: May it please the Court, your  
15 Honor, David Chesnoff on behalf of Mr. Smirnov.

16                          THE COURT: Sir.

17                          MR. KHOURY: Good afternoon, your Honor. Naser  
18 Khoury, K-H-O-U-R-Y, on behalf of Mr. Smirnov.

19                          MR. NARDIELLO: Good afternoon, your Honor. Chad  
20 Nardiello on behalf of Defendant, Alexander Smirnov.

21                          THE COURT: (Inaudible.) All right. Have a seat,  
22 Gentlemen.

23                          THE CLERK: Your mic.

24                          THE COURT: Oh, sorry. I've had so much paper  
25 coming on this little thing I've almost forgotten why we're

1 doing all this.

2           Where are we now?

3           MR. CHESNOFF: May I, your Honor?

4           THE COURT: Where are we -- yes.

5           MR. CHESNOFF: Thank you. Your Honor, the parties  
6 entered a joint agreement asking the Court to set bail  
7 pending appeal. It's an agreement between the Government  
8 and Mr. Smirnov. Pretrial Services has recommended that the  
9 Court follow that, which is consistent with prior Pretrial  
10 recommendations. We would most respectfully tell the Court  
11 that the standard for such a bail is the substantial  
12 likelihood of success on appeal. We have appealed to the  
13 Ninth Circuit.

14           THE COURT: Um-hmm.

15           MR. CHESNOFF: The Government agrees that there is  
16 a likelihood of success on appeal.

17           THE COURT: You're going to have to explain that  
18 one to me.

19           MR. CHESNOFF: They --

20           THE COURT: What is it that you're appealing that  
21 you think that there's going to be a substantial chance of  
22 success?

23           MR. CHESNOFF: We had a Rule 11 plea, your Honor.

24           THE COURT: Yes.

25           MR. CHESNOFF: And --

1           THE COURT: And you've got what you asked for.

2           MR. CHESNOFF: Not -- most respectfully, your  
3 Honor, we insisted at the conclusion of the sentencing that  
4 the Court agree that he get the credit for time served from  
5 both cases from the beginning of his arrest. The Court,  
6 again, your Honor, with due respect, repeatedly refused to  
7 put that on the record. And, as a result, he did not get  
8 the benefit of his contract and --

9           THE COURT: He got the benefit. He -- the deal  
10 was he was going to be sentenced somewhere between 48 and 72  
11 months.

12           MR. CHESNOFF: There were other conditions as  
13 well, your Honor, which included --

14           THE COURT: They don't apply to me.

15           MR. CHESNOFF: Well, it did, your Honor, most  
16 respectfully. But that's for the --

17           THE COURT: Well, number one --

18           MR. CHESNOFF: That's for the Ninth Circuit to  
19 decide at this point, your Honor, but --

20           THE COURT: You realize I'm not a party to a plea  
21 agreement? I -- I can agree to -- to accept it or reject  
22 it, but I'm not a party. I don't have any other duties --

23           MR. CHESNOFF: Right.

24           THE COURT: -- other than to carry out the  
25 sentence.

1           MR. CHESNOFF: And you accepted it. But you  
2 refused to say on the record all the terms of the agreement.  
3 So, now the Ninth Circuit will decide whether or not that  
4 was appropriate. But in consultation with the --

5           THE COURT: And what will that do?

6           MR. CHESNOFF: That will lead to him being able to  
7 withdraw his plea, your Honor.

8           THE COURT: That's what this is all about?

9           MR. CHESNOFF: Well, yeah. What it's really all  
10 about, your Honor, is protecting his rights and making sure  
11 that everything that he bargained for occurs and making sure  
12 that he's entitled to all the rights that someone in a  
13 Federal Court in the United States is entitled to, and the  
14 Government agrees with us, your Honor.

15           THE COURT: I want to ask which government, but  
16 I'm not. I don't care.

17           MR. CHESNOFF: Well, it's the present Justice  
18 Department.

19           THE COURT: Yeah.

20           MR. CHESNOFF: Different from the fellows that  
21 were here before.

22           THE COURT: Okay. That -- that's fine. It  
23 doesn't matter to me. I'm not a party to this agreement.

24           MR. CHESNOFF: But you accepted it, most  
25 respectfully, your Honor.

1           THE COURT: I did. And I agreed to sentence him  
2 accordingly, and I did. And I'll say it again. It is not  
3 within my purview or responsibility probably or authority to  
4 do the computations for time credits. That's the Bureau of  
5 Prisons.

6           MR. CHESNOFF: All right. Mr. Schon -- if --

7           THE COURT: Sure.

8           MR. CHESNOFF: -- the Court's indulgence?

9           THE COURT: Sure. Absolutely, yes.

10          MR. SCHONFELD: Your Honor, paragraph 19 of the  
11 plea agreement expressly provided that one of the  
12 conditional aspects of the plea agreement was that the Court  
13 would order that he receive credit from the date of his  
14 initial arrest, and the Court refused to grant that request,  
15 and that wasn't --

16          THE COURT: No, I don't -- I don't do that.

17          MR. SCHONFELD: But, your Honor, that's the point.  
18 If -- if the Court was not going to do that, the Court can't  
19 choose to piecemeal accept the conditional components of the  
20 plea agreement. Under the Ninth Circuit case law, the Court  
21 can either accept all aspects of the conditional plea or  
22 reject the conditional plea. In this instance, the Court  
23 accepted some components of the conditional plea and then  
24 refused to order the one component that's on appeal, which  
25 was conditional, and that is that the Court order that he

1 receive credit towards both cases from the date of his  
2 arrest.

3 As a result of that, paragraph two of the plea  
4 agreement expressly provides that the provisions of the plea  
5 agreement are void and a nullity, and, therefore, he's  
6 permitted to withdraw his plea. So, there is a high  
7 likelihood of success on appeal because the court accepted  
8 some components of paragraph 19 of the conditional plea but  
9 rejected one component, and the case law says that a plea  
10 agreement is contractual and, therefore, he would be  
11 permitted to withdraw his plea.

12 THE COURT: I have a feeling that one of the  
13 prongs that are necessary for his release pending appeal is  
14 that there be a high chance of success on appeal, and I  
15 doubt that's going to happen.

16 I'm looking at United States v. Jay, a memoranda  
17 decision filed February 20th of this year:

18 " Mr. Jay contends that the  
19 District Court erred by failing to award  
20 him credit under 18 U.S.C. Section  
21 3585(b) for time served on a related  
22 incarceration at the Fort Hall Tribal  
23 Justice Center. This claim fails  
24 because Section 3585(b) does not  
25 authorize a District Court to compute

1                   the credit at sentencing," citing United  
2                   States v. Williams, yada, yada, yada.

3                   "Rather, the Bureau of Prisons makes  
4                   that determination after the sentence is  
5                   imposed."

6                   Now, you all do what you will. I stand by my  
7 original decision. I am not computing time served. Okay.

8 Now --

9                   MR. CHESNOFF: Your Honor, assuming --

10                  THE COURT: Yes?

11                  MR. CHESNOFF: -- that the authority is as you  
12 stated, then Mr. Smirnov did not get what he bargained for  
13 because the Government agreed that he would get it, and he  
14 didn't get it, and it may be for the reasons you're stating,  
15 but the fact is you did not order it. You made your  
16 decision, but he didn't get the benefit of his bargain.

17                  And I just want to say one more thing in that  
18 regard, your Honor. The Government is agreeing in the Ninth  
19 Circuit to tell the Ninth Circuit that they agree with us.  
20 So, I know that the Court said you find it unlikely that  
21 they're going to do it, but the Government agrees with us,  
22 and they're going to tell the Ninth Circuit that they agree  
23 with us.

24                  THE COURT: And you want me to do something about  
25 that today?

1 MR. CHESNOFF: No.

2 THE COURT: Okay.

3 MR. CHESNOFF: I want you to --

4 THE COURT: What -- what do we have remaining to  
5 do today?

6 MR. CHESNOFF: I just want -- all I want is bail  
7 pending appeal, your Honor.

8 THE COURT: No.

9 MR. CHESNOFF: And may I make a further record  
10 then?

11 THE COURT: Sure.

12 MR. CHESNOFF: Thank you.

13 Number one, your Honor, we think we've established  
14 that there's a high likelihood of success on appeal. We  
15 understand the Court's position.

16 THE COURT: The court disagrees.

17 MR. CHESNOFF: Okay. Your Honor, the Government,  
18 Pretrial, and us have submitted to you that he is not a  
19 danger to the community --

20 THE COURT: No.

21 MR. CHESNOFF: -- nor that --

22 THE COURT: I don't believe he is.

23 MR. CHESNOFF: Okay -- nor that he's a flight  
24 risk, your Honor.

25 THE COURT: I'm not convinced on that one.

1 MR. CHESNOFF: Well, may I help you?

2 THE COURT: Sure.

3 MR. CHESNOFF: Okay. Originally, this Court was  
4 concerned about money that was allegedly unaccounted for,  
5 alleged --

6 THE COURT: How much?

7 MR. CHESNOFF: A million dollars, okay. That was  
8 what --

9 THE COURT: That was overlooked?

10 MR. CHESNOFF: No. This is what happened, your  
11 Honor. He was arrested. He was given a pretrial interview.  
12 he had no one there with him. They asked him, "What money  
13 do you have that's yours?" He told them the truth. He  
14 didn't know that he was supposed to talk about his  
15 significant other's account, which was her own account. She  
16 had her own money from prior relation -- from a prior  
17 relationship. And, so, he did not deliberately mislead you,  
18 your Honor.

19 I'm telling you now, your Honor, you were told  
20 that he misled you by people who told you that I believe  
21 during the initial ex parte communication that they had with  
22 the Court, before the Court issued the arrest warrant and  
23 had him arrested in our office.

24 So, the fact is he didn't mislead anybody, your  
25 Honor. And then the proof is in the pudding, your Honor.

1 He got -- did a Pre-Sentence Report. During the Pre-  
2 Sentence Report, the Probation Office did a thorough  
3 analysis of his -- his finances. At no time do they  
4 indicate anywhere in that report, which the Government  
5 signed off on, that he hid money, that he had hidden money,  
6 that he did anything to suggest that he had hidden money.  
7 And then your Honor will remember that just before the  
8 sentence -- the -- the sentencing or the entry of the plea,  
9 he actually paid almost \$700,000 to the Government, close to  
10 the million dollar figure that this Court is concerned with.  
11 So, he gave the Government \$671,000.

12           So, the idea, your Honor, that somehow he has  
13 hidden assets, that's been gone over by Probation for the  
14 Pre-Sentence Report. Pretrial has analyzed it. The  
15 Government that is agreeing with us that he should get bail  
16 pending appeal agrees that he is not a flight risk because  
17 of hidden money.

18           And there's something else, your Honor, I know you  
19 will feel this impactful. At no time were any bank accounts  
20 of his seized, any records of his seized. The IRS did a  
21 thorough investigation of his finances in reaching the  
22 conclusion as to what amount of money he owed. If he had  
23 hidden money, your Honor, they would have ferreted it out.  
24 There was never a forfeiture action taken against him. So,  
25 the fact remains, your Honor, based on an initial

1 conversation from the Government which they never proved by  
2 any kind of real evidence that he had hidden money, the  
3 Court -- and I understand it, your Honor. They're telling  
4 you that. But it's just not a fact, and I know you well  
5 enough by now, your Honor, to know that if something isn't  
6 true, you're not going to rely on it. And, so, I'm asking  
7 you to understand he has nothing hidden.

8           The most important reason to get him out now, your  
9 Honor, he still hasn't had that eye surgery. And I recall  
10 standing at sidebar with Mr. Schonfeld where you told me  
11 that you'd never let him go blind. Well, unfortunately,  
12 your Honor, since his arrest and without the surgery, he has  
13 gone legally blind. That's been documented by the doctors  
14 that saw him since he's been in and by Doctor Tanaka, world  
15 renowned surgeon who reviewed all of his medical records  
16 since he's in. He now needs surgery. We hope -- were  
17 hoping to get it done a week ago. The surgery can help  
18 restore what -- the damage that's been done.

19           But to suggest, your Honor, that he's not going to  
20 go to Vegas and live in his -- he has a residence. He's  
21 been on the west coast for 20 years, your Honor. He has no  
22 prior criminal record whatsoever, and he worked for the  
23 Government for 12 years, your Honor, providing them with  
24 valuable information that led to multiple prosecutions, and  
25 the Court is also aware that other agencies were involved,

1 that he helped.

2           This isn't a fellow who did this to work off a  
3 case, your Honor. This isn't a fellow who is a criminal.  
4 This is a person who made a conscious decision to act  
5 patriotically and assist the United States Government. And  
6 the agent who handled him and the FBI wrote -- you've seen  
7 them -- nothing but superlative reports about him, nothing  
8 but the highest praise for him when he was working with  
9 them, and only -- only after years did the special  
10 prosecutor step in and make the allegations that the special  
11 prosecutor made.

12           And the Court should know at one point in time the  
13 Government had closed the investigation. So, I'm asking  
14 you, your Honor. I know -- I know you came in here thinking  
15 that you shouldn't do this, but I'm telling you, your Honor,  
16 it's in the interest of justice that this happen now. Let  
17 him get bail. Let him go and get his surgery. Let us see  
18 what happens with the appeal. And then, your Honor, we'll  
19 all deal with -- with the results.

20           But to keep him continually locked up when there  
21 are so many good reasons to let him out, no criminal  
22 history. You'll recall his stepson who he raised is -- not  
23 only works for the Government, he's a former Marine. He's  
24 attested to him. He wrote to you in the beginning of the  
25 case, your Honor.

1           I'm not going to say a lot more, your Honor. But  
2 I am telling you this is a situation and a circumstance  
3 where Pretrial, the Government, and the Defendant are all  
4 asking you most respectfully, your Honor, to let him out on  
5 bail pending appeal. Thank you.

6           THE COURT: Does -- does the Government have  
7 comments?

8           MR. KEENAN: Yes, your Honor. And I actually  
9 wanted to talk about this Government. One of the great  
10 things -- I've been in the U.S. Attorneys Office for 24  
11 years, and one of the great things about it is that,  
12 regardless of what administration happens to be in control  
13 in D.C., the rules are still applied. It's important that  
14 they be applied, and over the years, that's what I've  
15 observed, that they've been applied consistently and equally  
16 and fairly, but also with some recognition that sometimes  
17 cases deserve a second look. There's a great -- great book  
18 by Dennis Prager called Think a Second Time, and there's --  
19 the substance of the book is reflected in that title. There  
20 -- there's no harm in looking at something anew and making  
21 sure we got it right.

22           And on that subject, getting back to one  
23 government nationwide, whether -- regardless of what the  
24 administration is and what party's in control to not -- to  
25 put a blunt point on it --

1           THE COURT: Um-hmm.

2           MR. KEENAN: I don't recall what time last year it  
3 was, I think middle of last year, the former U.S. Attorney  
4 under the old administration, under President Biden and  
5 Merrick Garland, Martin Estrada, down that decision chain or  
6 chain of authority -- the former U.S. Attorney created an  
7 office -- I think it's staffed by one or two people, and I  
8 think it's still reflected on our website. I haven't seen  
9 it recently, so I can't swear to it today, but I believe the  
10 office and unit -- or if you -- probably a unit is a better  
11 term. It's a post-conviction review process, and it wasn't  
12 established by the new government or a new government or a  
13 new administration. It was the old one, and we're doing the  
14 same thing that Martin Estrada thought was fair and just,  
15 same thing, no difference.

16           Now, to be fair, Martin Estrada and the government  
17 that existed prior to January 20 wasn't the one that  
18 prosecuted this case. As you know, it was -- that  
19 responsibility was given to the Special Counsel's Office,  
20 one of two Special Counsel Offices.

21           So, it's one government trying to do the right  
22 thing. That's what we're attempting to do. Without any  
23 promises or guarantees, to my knowledge about what the end  
24 result will be, it's my understanding that the review  
25 process is not complete. Decisions might be made in the

1 future, potential things. I understand what the Defendant  
2 and his counsel hope for, but to my knowledge, there's been  
3 no promises or guarantees about a final decision.

4 I -- I, frankly, think the recent filing -- the  
5 stipulation also filed I think last week about amending the  
6 protective order would be a good indicator of that. That  
7 was a -- a protective order that would allow defense counsel  
8 to share certain sensitive, confidential documents to  
9 persons outside the prosecution team.

10 THE COURT: Um-hmm.

11 MR. KEENAN: And the Court signed that, and I want  
12 to thank you for that, along with defense counsel. We  
13 appreciate the Court's approval of that stipulation.

14 But that -- that's an indication that the process  
15 is still underway and that whatever hoped for decisions  
16 there might be, it will be the process -- the end result  
17 will be the result of a -- a deliberative process and full  
18 review, sort of de novo review of what happened in  
19 connection with this case.

20 THE COURT: I -- I --

21 MR. KEENAN: Now, so -- I'm sorry.

22 THE COURT: Let -- I want to interrupt you now  
23 because -- since you're getting into this particular  
24 issue --

25 MR. KEENAN: Yes.

1           THE COURT: -- it was like passing reference was  
2 made to the fact that the Government was reviewing its  
3 earlier decisions, earlier prosecution decisions. And I'm  
4 wondering what the hell does this mean. Seriously? At this  
5 stage, the Government is -- is taking a look at this case  
6 anew? Is that --

7           MR. KEENAN: Correct.

8           THE COURT: Am I reading that correctly?

9           MR. KEENAN: Yes, your Honor. And that's why I  
10 started with that unit Martin Estrada --

11          THE COURT: Okay.

12          MR. KEENAN: -- created.

13          THE COURT: Right. Right.

14          MR. KEENAN: I want to make clear there's nothing  
15 new under the sun with the U.S. Government. We're -- we're  
16 applying the same rules that, to my knowledge, as a 24-year  
17 veteran of the Department of Justice, have been applied at  
18 all times, and that is that we want to make sure we get the  
19 result right and that it's -- the end result is fair and  
20 just. And there is no unwarranted disparity in the way  
21 cases are treated. And that's what we're trying to do, same  
22 thing as with Martin Estrada's administration of the U.S.  
23 Attorneys Office.

24          Okay. So, let's get to the -- if I might, to --  
25 with that important context because I think it really is

1 important to stress. The issue about the -- the Defendants  
2 -- or Defendant intends to or I think it now has presented.  
3 I think the opening brief was filed on Friday I just learned  
4 -- relating to the -- the -- the crediting of time served.

5 I think that the -- the point I want to make --  
6 and we've had no time to prepare an answering brief, and I  
7 probably won't be involved in doing that because I'm going  
8 to be heading out of town for a detail, but the -- the -- my  
9 observation in looking at the plea agreement and the  
10 stipulation and a draft of the opening brief that the  
11 Defendant's counsel were kind enough to provide is that this  
12 -- this language that's the subject of dispute on appeal,  
13 that is the basis of their claim of error, is unusual. It's  
14 not what we typically include in any of our plea agreements.

15 I see that as a general rule, they -- the Special  
16 Counsel's Office appears to have asked someone in our office  
17 to give us a -- give them a sample form agreement, but this  
18 language is unique. It appears to be the basis of hard-  
19 fought negotiation between Special Counsel and the  
20 Defendant's fine attorneys here. And they're really very  
21 good and have done some impressive work.

22 But it's different, and I -- I do want to suggest  
23 it's not clear to me that the argument is necessarily that  
24 the Court made an error. It -- it may -- and that the --  
25 the issue will turn necessarily on what the statute says

1 regarding the crediting of time.

2 I think that issue will have to be evaluated in  
3 this case on the facts of this case in light of the language  
4 of this paragraph 19 of the plea agreement. And this  
5 language, like I said, I don't know if the argument has been  
6 made that it's vague. I don't think they need to say that  
7 actually, but the -- the argument is that -- the -- the  
8 sentence provides that the credits that the Bureau of  
9 Prisons may allow under Section 3585 "may be credited  
10 against this stipulated sentence, including credit under  
11 Sentencing Guidelines Section 5(g)1.3."

12 Now, when I looked at 5(g)1.3 in preparation for  
13 this hearing, I'm not sure, frankly, what the Special  
14 Counsel who drafted this agreement and who -- the -- the  
15 Government is -- is -- as the draftsman of plea agreements,  
16 any ambiguity in the language is going to fall on us, not on  
17 the Defense, and that's the way it should be.

18 It says including credit under the Sentencing  
19 guidelines, under 5(g)1.3. The only provision of that  
20 guideline that I see potentially applicable and which I,  
21 therefore, assume the Special Counsel must have been -- must  
22 have had in mind is a provision which it's subsection (b) I  
23 believe, (b) (1) maybe, where they talk about how the Court  
24 can -- let me get the language actually, rather than rely on  
25 my failing memory.

1           It says the Court -- as part of Subsection (b),  
2 and, again, one questions whether the -- what relevance the  
3 guideline has at all, but it's cited by the Special  
4 Counsel's Office as part of the agreement that it -- that it  
5 is a key part. It's the paragraph that defines what the  
6 parties are agreeing to regarding a potential sentence. And  
7 in Subsection (b)(1), it talks about how the Court under  
8 certain circumstances shall adjust the sentence for any  
9 period of imprisonment already served on the undischarged  
10 term of imprisonment.

11           I think that what they're talking about is that we  
12 had -- as the Court knows, there were two cases resolved as  
13 part of the -- the plea -- this plea agreement, and I think  
14 it was largely a duplicate, if memory serves, that was filed  
15 in the other case. And they were both -- the Defendant was  
16 sentenced at the same time relating to both cases. So, I  
17 think they have that in mind. And, as a result, I think  
18 that Defense raises a substantial question in my mind not  
19 about what the statute provides and, you know, whether the  
20 Court has jurisdiction to credit stuff under the guidelines.  
21 It suggests that the Court does have the ability at least  
22 under Booker these days to give credit for time served on  
23 the stipulated sentence, which may arguably -- and that's --  
24 any ambiguity, again, goes for the Defense -- that it may  
25 proper -- that the Defendant may have understood that the

1 credit for time served would be taken away against the  
2 stipulated sentence, whatever the court had agreed upon.

3 So, that's my concern, and I think that when we  
4 entered the stipulation, we had -- it wasn't -- I don't want  
5 to say we because I was asked to be on the case I think  
6 Wednesday of last week. So, it was after the stipulation  
7 was filed. But when I started looking at it, that -- that  
8 was the question that immediately came to my mind as -- as  
9 an ambiguity that raised the issue about whether the credit  
10 for time served should have been decided by the Court and  
11 whether it could have been, under the Sentencing Guidelines  
12 and should have been credited at that time against the 72  
13 months which would have substantially reduced the sentence  
14 by about 11 months.

15 THE COURT: That is -- that is done --

16 MR. KEENAN: That's -- that's my view.

17 THE COURT: That is done by the Court under  
18 certain circumstances.

19 MR. KEENAN: Yes.

20 THE COURT: One of those circumstances -- well,  
21 the only circumstance I can find is that when the Court  
22 determines that the Bureau of Prisons will not make the  
23 adjustment.

24 MR. KEENAN: That's one circumstance.

25 THE COURT: I don't see any others.

1                   MR. KEENAN: Under the -- under the Sentencing  
2 Guideline 5(g)1.3, it appears to be within the Court's  
3 discretion to do that, and it appears on the language of  
4 paragraph 19 that that's exactly what the Defendant expected  
5 as part of the -- the plea bargain that he struck with the  
6 Special Counsel's Office. It's a hard-fought negotiation,  
7 and that's what the product of it was, and I -- I do think  
8 at -- I'm making no final representation about how the --  
9 the appeal may result. The Ninth Circuit would decide that.  
10 But is it a substantial question? Well, as to that, there  
11 was a -- I want to -- you know, the -- the Ninth Circuit has  
12 made clear as far back as United States v. Handy -- that's a  
13 case often cited in connection with these motions -- it  
14 says:

15                   "We conclude that a substantial  
16 question is one that is fairly debatable  
17 or fairly doubtful. In short, a  
18 substantial question is one of more  
19 substance than would be necessary to a  
20 finding that it is not frivolous," which  
21 is a remarkably low standard. And they could have put that  
22 more blunt -- more simply I think we can all agree -- a  
23 nonfrivolous argument.

24                   And in light of my view and, frankly, concerns  
25 about the -- the nature of the language and how it meshes

1 with the statutory provision that the Court was making  
2 reference to in the Ninth Circuit case law relating to that  
3 and 5(g)1.3 and the guidelines, I think there's a  
4 substantial question that is likely to result in reversal of  
5 the sentence, not due to any error on your part. I want to  
6 make that clear.

7 THE COURT: Then what happens? Then what happens?

8 MR. KEENAN: It's --

9 THE COURT: So -- so, the -- the -- the -- there's  
10 a -- well, what -- what you believe Mr. Smirnov is looking  
11 for is for the Ninth Circuit to set aside his entire  
12 sentence?

13 MR. KEENAN: To vacate the sentence and send it  
14 back for resentencing.

15 MR. CHESNOFF: No. To withdraw the plea.

16 MR. SCHONFELD: To withdraw the plea.

17 THE COURT: Oh, you're going back --

18 MR. KEENAN: I'm sorry. At -- at which point --  
19 at which point it would be an option for them to withdraw  
20 the plea.

21 THE COURT: Okay. "And go to trial?

22 MR. SCHONFELD: Correct.

23 THE COURT: Okay.

24 MR. KEENAN: So, now, on that subject, you know,  
25 it's a question of how much -- you know, in base -- I'm not

1 a baseball fan, but I'll fake it for a minute. My  
2 recollection is that, you know, the pitch zone or whatever,  
3 right, you know, zone umpires have it a little wider than  
4 others, a little taller than others.

5 So, like I said, I'm -- I'm really not a fan. I'm  
6 faking it. But I watch the news -- nightly news, and the  
7 sports guys talk about that sort of stuff.

8 So, anyway, when you're -- when you're evaluating  
9 -- when you're evaluating the substantiality of the claim  
10 and the -- the parties' stipulation and the arguments which  
11 I've just gone through and the defense counsel have gone  
12 through, I think it's important to consider on -- on -- you  
13 know, how much leeway you give those arguments, how much  
14 weight you give them, in other words, as well as to the  
15 issue of flight, an important issue, and it's an equitable  
16 one, a really important one in my view, and that is that his  
17 -- he has a serious medical problem which is causing  
18 deterioration of his eyesight while he's been in custody.

19 The first time I heard that, because I'm a  
20 skeptical guy, you know -- after 24 years as a prosecutor,  
21 you -- you get that way, but so I -- I started to ask. The  
22 first question I had is, Where is the proof of that? Well,  
23 the -- the proof is that he's had seven prior surgeries.  
24 It's referenced in the Pretrial Services Report, I think the  
25 first one and the second, if memory serves.

1           He has -- he's had seven prior surgeries during  
2 the preceding year before he was detained in connection with  
3 this case, surgeries -- or surgical procedures designed to  
4 reduce the intraocular pressure, which is essential for  
5 glaucoma, to ensure that it doesn't deteriorate the -- the  
6 ocular nerve and ultimately lead to blindness. And it is an  
7 unfortunate fact -- I wish it weren't true, but it is an  
8 unfortunate fact that the BOP and the U.S. Marshals Service  
9 has not -- have not been able over the time that he's been  
10 in custody to ensure that he gets those surgical procedures,  
11 and they need to happen on a regular basis, which is why  
12 he's had seven of them already.

13           And, as a result, it is my understanding that --  
14 and as defense counsel have represented, that when the -- I  
15 think it was the Marshals Service in or around November of  
16 last year took him out of custody and brought him to some  
17 sort of a medical consultant doctor, aka, a doctor, that --  
18 that they determined that he had suffered a degradation to  
19 his eyesight and is now legally blind, which is awful.

20           There's a -- there's a -- a phrase I've heard or a  
21 sentence that I've heard recently, well, last few years,  
22 talking about how -- and it's usually a -- it's usually in a  
23 sarcastic and derisive criticism of the criminal justice  
24 system, and it is that the process sometimes is the  
25 punishment. And, so, we want to make sure because the

1 Department of Justice is willing to take a look, just as  
2 Martin Estrada would, is willing to take a look anew at this  
3 case and how -- its provenance and how it came about and the  
4 other particulars, to evaluate the fairness of the  
5 prosecution. The question is, while that deliberative  
6 process is underway, should Mr. Smirnov be detained pending  
7 his appeal and pending that deliberative process. And I  
8 think in light of, in my view, the decision maker, I submit  
9 to you, ought to be the Court's ultimate decision maker as  
10 to how its -- how it evaluates the -- the question under  
11 whatever statute, 3413 I think it is, that the Court ought  
12 to give significant weight to the medical issue that is over  
13 time blinding Mr. Smirnov. I think he's in his early 40s.  
14 That's intolerable to me. It's intolerable to my office,  
15 and we think it should be given great weight by the Court in  
16 ruling on this stipulation.

17 If I might just finally address some issues just  
18 about flight, it is accurate that the Pretrial Services  
19 Office first out in Nevada and then out here, just in their  
20 Pretrial Services Report issued on Friday I think it was,  
21 concluded that he's not a flight risk and that -- that bail  
22 pending appeal would be appropriate.

23 I think, as the -- as the stipulations and some of  
24 the arguments you've heard today make clear, this is a  
25 Defendant who has continued to engage with the Government.

1 He -- as you know, as the record makes clear, he previously  
2 served approximately 12 years as an informant for the FBI  
3 and before that, HHS, Health and Human Services. And he's  
4 continued to engage the Government in discussions about his  
5 case through his counsel, and the -- the Department is -- I  
6 don't want to speak on behalf of the Department. My  
7 understanding is that the -- the Government generally is  
8 receptive at least to the -- the presentations that have  
9 been made thus far and willing to listen and willing to take  
10 a second look and to, as I said earlier, think a second  
11 time.

12           And, so, in light of that, we are at -- when it  
13 gets to -- I'm still talking about flight. When we get to  
14 the subject of flight risk, the -- whatever impulse he might  
15 have had in February -- I don't think he had any impulse at  
16 the time, for reasons I'll mention in a moment -- but it's  
17 the -- the lowest incentive that he would ever have to flee  
18 the country is right now, when he has a receptive ear to  
19 people who are willing to look at it anew, at his case anew,  
20 and see whether or not a different result might be the  
21 appropriate disposition of this case.

22           So, I don't think he has an incentive to flee.  
23 And, again, if he ever did, it's the lowest incentive at  
24 this point. It would be foolish and absurd for him to flee  
25 to the garden spot of Russia, maybe a nice -- you know, nice

1 spot on the coast of Siberia perhaps. He's been a life --  
2 not a lifelong but a longtime resident of this country.  
3 He's a naturalized citizen, a longtime resident of the  
4 southwest of the United States, living either in California  
5 or Nevada for approximately 20 years. He has a longtime  
6 relationship with a -- variously described in the papers, as  
7 a common law spouse or a girlfriend. He has a stepson who  
8 he loves and who, as the Court mentioned, that was the  
9 servicemember who I think submitted some sentencing letter  
10 on his behalf.

11           And, so, he has significant ties to this country  
12 is my point, and it's -- it's consistent with his work as an  
13 informant as well, which, you know, I always take the view  
14 that when we're talking about cooperators who do work on  
15 behalf of the Government and then occasionally they -- they  
16 run afoul of a particular statute, I think it's really  
17 important to consider both the -- the good and the bad,  
18 right. We always look at criminal history. What's his  
19 criminal history? You know, it can go back 10 years, but we  
20 still take account of it, and -- and I think the good  
21 conduct ought to be considered as well and in evaluating  
22 flight risk and the general issue that the Defense intends  
23 to pursue on appeal.

24           Is there anything else I wanted to say? I think  
25 -- I think that's it. Thank you very much for your

1 attention. I much appreciate it. Thank you.

2 THE COURT: Thank you, sir, for clarifying --  
3 clarifying some things. Of course, you have -- since you  
4 aren't participating in this -- this reexamination of the  
5 Government's charging decision in this -- this case, you  
6 probably can't even make an educated guess as to how long  
7 this process is going to continue.

8 MR. KEENAN: I wish I could, but I can't.

9 THE COURT: Okay. That's fair.

10 MR. KEENAN: But I think there's an -- an interest  
11 in resolving it quickly, and what quickly means is,  
12 unfortunately, where I get hazy. I don't know really what  
13 that means, but I -- I know that it has the attention of  
14 people above me in the decision making chain, and that I --  
15 I don't think they want it to sit around endlessly and  
16 percolate. They want to look at it and make a decision.

17 THE COURT: I've seen evidence of U.S. Attorneys  
18 Office being presented with really a massive amount of work  
19 and not much time to do it actually get it done, much to my  
20 amazement. So, if they are suitably motivated --

21 (Pause.)

22 THE COURT: Anyway, I think when suitably  
23 motivated, they can do vast amounts of work in a short  
24 period of time. So, I'm going to hold out hope that --  
25 pardon?

1 (Pause to confer with clerk.)

2 THE COURT: Back to what I was going to say, I'm  
3 fairly -- I'm fairly confident that when properly motivated,  
4 the Government is going to -- to move expeditiously in terms  
5 of their review and making a decision one way or another  
6 what they plan on doing with this case.

7 Right now, I've done all I'm going to do with this  
8 case, and Mr. Smirnov doesn't agree with that. So, the  
9 fortunate thing is it is now before the Ninth Circuit, and  
10 I'm satisfied to let them do their work.

11 So, everyone has had a chance to speak, the matter  
12 stands submitted.

13 MR. KEENAN: Yes, your Honor. Thank you.

14 THE COURT: I haven't heard anything that's going  
15 to change my mind. So, with that, we're done.

16 MR. KEENAN: Very well. Thank you very much, your  
17 Honor.

18 THE CLERK: The court is in recess.

19 (Proceedings concluded.)

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1 I certify that the foregoing is a correct  
2 transcript from the electronic sound recording of the  
3 proceedings in the above-entitled matter.

4

5 /s/Jordan Keilty \_\_\_\_\_ 4/29/2025 \_\_\_\_\_  
6 Transcriber Date

7 FEDERALLY CERTIFIED TRANSCRIPT AUTHENTICATED BY:

8

9 /s/L.L. Francisco \_\_\_\_\_  
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